Appendix

The Anglo California National Bank of San Francisco (a respondent herein) is a national banking association and is the outgrowth of a consolidation on June 30, 1932, of The Anglo California Trust Company, a California State Bank, and The Anglo London Paris National Bank, a national banking association (for convenience, said consolidated bank is hereinafter referred to as "Anglo Bank").

E. H. Denicke is a stockholder of the Anglo Bank and became such at the time of the above-mentioned consolidation, he, prior to such consolidation, having been a stockholder of The Anglo California Trust Company. The number of shares held by Mr. Denicke is 1600 (R1045), or 6.08 of 1% of the total outstanding shares of said Anglo Bank. Mr. Denicke is one of the petitioners before the above-entitled Court, was the plaintiff in the District Court, and one of the appellants in the Circuit Court of Appeals.

The action in the District Court was commenced on November 7, 1938, by said Ernest H. Denicke, and purported to be a representative and derivative action brought by said shareholder for the purpose of making certain claims on behalf of Anglo Bank against a number of its officers and directors holding office for varying terms during the twenty-five years immediately prior to April 1, 1939, on which date there was a distinct change in the management of said institution, as well as against certain of the present directors of said Anglo Bank. Said Ernest

H. Denicke was represented in the District Court and the Circuit Court of Appeals by attorney Aaron M. Sargent.

Petitioner Mary E. Doble is a shareholder of Anglo Bank, holding 1752 shares (R282), which shares were acquired by her in The Anglo London Paris National Bank prior to the above-mentioned consolidation. Said Mary E. Doble was not a party to the action pending in the District Court, but several days prior to the hearing by the District Court of a petition filed by Anglo Bank to compromise said derivative action, an effort was made by Mary E. Doble to intervene (R364) in said action as a party-plaintiff. Said attempt to intervene was denied by the District Court but subsequently said Mary E. Doble appeared at the hearing on the Bank's petition to compromise pursuant to an Order to Show Cause why said action should not be compromised, sent out to all shareholders of record of Anglo Bank (March 31, 1942). She was then represented by attorney Aaron M. Sargent and filed objections (R340) through said attorney to the granting of the Bank's petition. Since the entry of the Judgment of the District Court approving the compromise and ordering the termination of the action, which judgment was reviewed by the Circuit Court of Appeals, said Mary E. Doble has participated in all proceedings taken in the same manner and through the same attorney as said Ernest H. Denicke.

The complaint, as originally filed (R925), was subsequently amended (R62) and supplemented (R290) so that at the time of the hearing on the Anglo Bank's petition to compromise, there was on file a second amended

complaint (R6), which had been amended and supplemented.

Said second amended complaint (R6) was in Eight Counts. The First Two Counts set forth the transactions upon which the action was predicated. The First Count was against the defendants Mortimer Fleishhacker and Herbert Fleishhacker, formerly directors and the chief executive officers of Anglo Bank, and the Second Count was against the same defendants, but in addition included Mortimer Fleishhacker, Jr., Empire Farms, Inc., Charles E. MacLean, R. H. Holmberg, Mandeville Island Farms, Roscoe C. Zuckerman, Sol Z. Klein and Jack Klein.

Counts Three to Eight, inclusive, set up claims against other directors of said banking association for the periods during which said directors served on said association's board, based on the transactions referred to in Counts First and Second, together with the claim that such directors, during the respective periods of their office, abdicated and delegated their duties to the defendants Herbert and Mortimer Fleishhacker, thereby defrauding said banking association.

The substance of the claim in Count First was that on January 1, 1920, defendants Herbert and Mortimer Fleishhacker conspired together to defraud one George Shima and said banking association's predecessor (The Anglo London Paris National Bank) by using their respective offices and control to cause predecessor bank to make loans to one George Shima, in excess of the legal loan limit, in violation of 12 USCA 84, in order to exact bonuses or emoluments from said George Shima. In support of this

claim, it was alleged that between the above date and the date of the death of George Shima on March 27, 1926, certain loans were made to George Shima; that subsequently, additional loans were made to his estate; that these loans were never repaid; that at the time of the making of said loans, the predecessor bank's loan limit never exceeded $500,000; that certain bonuses were received by Herbert Fleishhacker. In addition to the return of the principal, it was claimed that an interest charge should be exacted, determined by compounding 6% monthly over a long period of years.

Claims in the Second Count were as follows:

It was alleged that on January 1, 1930, the Shima Estate owed the predecessor bank amounts in excess of the bank's loan limit; that the predecessor bank held no security and the Shima Estate was insolvent. That defendants Herbert and Mortimer Fleishhacker conspired together to reorganize the Shima Estate and Shima enterprises in order to cover up their liability by reason of making excessive loans; that to bring about this reorganization, said Fleishhackers used their offices to cause the predecessor bank to advance additional sums to defray the additional expenses of reorganization. It is then alleged that on June 30, 1932, the predecessor bank was consolidated with Anglo California Trust Company to form the present banking association; that after such consolidation, defendants Mortimer Fleishhacker, Herbert Fleishhacker and Mortimer Fleishhacker, Jr., conspired together to cause Anglo Bank to advance monies for the purpose of improving Mandeville Island Farms, an asset of Empire Farms, Inc., a corporation which resulted from the foregoing reorganiza-

tion, in order that the Fleishhackers could subsequently purchase said asset at an inadequate consideration; that in order to further this conspiracy, Mandeville Island Farms, Inc. was formed, with Roscoe Zuckerman and Sol and Jack Klein its shareholders; that said stockholders were merely dummies; that the Fleishhackers then, through control of Empire Farms, Inc. (the Anglo Bank had become a large shareholder by accepting stock for the obligation of the Shima Estate) caused it to sell Mandeville Island to Mandeville Island Farms, Inc. for an inadequate consideration. It was then claimed that Anglo Bank made advances to Mandeville Island Farms, Inc. and that Empire Farms, Inc. likewise made advances to Mandeville Island Farms, Inc. and, in one instance, made gifts. It was further contended that defendants MacLean and Holmberg, as officers of Empire Farms, Inc. were merely dummies of the Fleishhackers; that Empire Farms, Inc. sustained damage in that it did not receive all of the purchase price of Mandeville Island and that through the sale of Mandeville Island, its financial position was so affected that it was unable to meet its obligation to Pacific Life Insurance Company, which held a mortgage on the Shima Tract, originally one of the assets turned over to Empire Farms, Inc. under the above reorganization.

$5,299,294.82 Damages Were Prayed For.

After a number of steps preliminary to trial had been taken, and the plaintiff had exercised about all of the forms of discovery (R925 to 956) available under the Federal Rules of Civil Procedure, and in excess of three years had elapsed, the various defendants, with the exception of Anglo Bank, filed their answers (R105 to 191) and

the case was at issue. In the meantime, the Anglo Bank had changed (April 1, 1939) its management, so that said management was in the hands of individuals (R241) who were not in any way connected with said litigation (R323). No answer or other pleading on behalf of Anglo Bank was filed, either admitting or denying any of the allegations in the various pleadings filed by the plaintiff and defendants. The new management of said Anglo Bank did, however, carry on an extensive investigation (R1057) concerning said litigation and claims made therein. Negotiations with both the plaintiff and the defendants were had looking toward the closing of the litigation (R1067) in a manner which would free said institution from the unfavorable publicity and expense of such litigation and, at the same time, place said banking association and its shareholders in the best possible position, having regard to all of the circumstances. As a result of said investigation and negotiations, said disinterested management had concluded that, if the within suit could be compromised and settled, along with another derivative suit which had been filed by the same plaintiff, through the same counsel, for the sum of $350,000, it would be to the best interests of said Anglo Bank and its stockholders that said compromise be effected (R1179). Accordingly, on July 1, 1941, said Anglo Bank, having received written offers from the various defendants to pay the sum of $350,000 in full settlement of all derivative claims made against them, filed a petition (R239) with the District Court under rule 23(c) FRCP to obtain Court approval of said proposed settlement and a dismissal of said litigation. Before said petition was filed, the offers of compromise in question were submitted to the disinterested members of the Bank's Executive

Committee and of its Board of Directors (R242). By unanimous action of both bodies, the advisability of such settlement was determined upon and said matter submitted to all the shareholders of the Anglo Bank. A special meeting of said shareholders was held on July 7, 1941, at which meeting the offers of settlement were presented (R1043), as well as the recommendations (R1130) of the disinterested members of the Bank's Executive Committee and of its Board of Directors. The matter was thrown open for discussion and Mr. Sargent, as the representative of the plaintiff, Mr. Denicke, and the petitioner, Mrs. Doble, read to the meeting a prepared written statement (R1137) recommending that the compromise settlement be not accepted, and giving his reasons. A complete transcript of the shareholders' meeting is in the record (R1117), said meeting having been reported and transcribed by the official Court Reporter at the order of the District Court. At the close of discussions, the motion, which had been made and seconded, that the action of the disinterested members of the Executive Committee and of the Board of Directors, in accepting the offers of compromise, be adopted subject to the approval of the District Court, was put to a vote. Less than 2/10 of 1 per cent (R1051) of the total outstanding stock of the Anglo Bank voted against the compromise of said litigation, and 77.5 per cent of this amount composed the shares owned by plaintiff, Mr. Denicke, and the petitioner, Mrs. Doble. More than 95 per cent of the total outstanding stock voted in favor of the resolution.

In accordance with the order of the District Court, and notice to shareholders, a hearing was commenced on July

14, 1941, on said Bank's petition to compromise and terminate the action in question (R989 to 1844). At this hearing, the District Court, the Hon. A. F. St. Sure, before whom the within litigation was pending, and the District Court, the Hon. Michael J. Roche, before whom the other derivative suit previously mentioned was pending, sat jointly. Since the two cases had not been consolidated, it was stipulated that all of the evidence offered and received would be deemed evidence offered and received in each case in which it was relevant. This joint hearing extended over six trial days, twelve witnesses were sworn and testified, thirty exhibits were offered by the plaintiff and received and thirteen exhibits were offered by the petitioner and received. Among the witnesses testifying was the president of the Bank, Mr. William H. Thomson (R1031) and the first vice-president, Mr. Allard A. Calkins (R1769), both witnesses whom appellants are now contending that they had no opportunity to cross-examine in open court. There were ten other witnesses who testified, among them Mr. Mortimer Fleishhacker, Sr. (R1448), one of the defendants that the plaintiff contends he never had an opportunity to cross-examine in open court. The District Courts allowed great latitude to counsel in their examination and were extremely liberal in receiving evidence offered. In fact, considerable evidence was offered by the plaintiff and received that did not lie within the issues submitted by the pleadings in either of said cases. After submission, written briefs (R1844) were filed by Mr. Sargent and the Bank's counsel, as well as by counsel for certain of the defendants. In January of 1942 (R287), it was determined by each of said District Courts that the Anglo Bank's petition to compromise and terminate said actions be de-

nied "without prejudice to the filing by said bank, if so advised, of separate offers of compromise in each of the actions". Thereafter, separate offers of compromise were received by the Bank looking towards the termination of said actions. In each action, said defendants offered (R391, 321) to pay the sum of $200,000.

As to the action pending before the Hon. Michael J. Roche, a petition was filed by the Anglo Bank on the second offer of compromise, a hearing had, and said action dismissed upon the payment to the Bank of $200,000. Neither the plaintiff, Mr. Denicke, nor the petitioner, Mrs. Doble, nor their attorney, Mr. Sargent, presented any objection to said compromise and dismissal at the final hearing, though previously to that time, they had interposed considerable objection. In fact, they approved it.

As to the case pending before the Hon. A. F. St. Sure, a hearing was had on the Anglo Bank's petition to terminate on March 31, 1942 (R1845). This hearing was noticed in the same manner that the previous joint hearing had been noticed. Written objections were filed by the plaintiff (R333) and Mrs. Doble (R340) prior to said hearing. They were each represented at said hearing by attorney Sargent, who cross-examined Mr. William H. Thomson, the president of the bank (R1856) and Mr. R. H. Holmberg, the assistant-secretary (R1849), each of whom testified at said hearing. At this hearing, it was stipulated by Mr. Sargent and counsel for the Bank that the entire record and proceedings in connection with the July, 1941 hearing be considered as evidence in the matter then being heard by the District Court (R1846) along with the oral argu-

ments and briefs then on file (R1888). At the close of said hearing, the matter was submitted to the District Court for decision. The record is clear in this respect (R1888-1890), though petitioners contended in the Circuit Court of Appeals that said matter was not submitted, but continued for further hearing. On June 29, 1942, the District Court entered its order denying the objections of plaintiff Denicke and shareholder Doble to the Bank's petition to terminate and granting the Bank's petition (R438). In granting the Bank's petition, the District Court rendered a written opinion (R440-457). On July 2, 1942, a judgment was entered, approving the compromise of the litigation and authorizing a dismissal with prejudice upon the Bank's receiving the sum of $200,000 (R458-463). Said sum was received and a dismissal with prejudice entered of record.

Thereafter, petitioners filed a number of papers in the proceeding, for example, a third amended complaint was filed (R538), a motion to confirm the intervention (R466) of shareholder Doble, a motion to permit the taking of depositions of a number of high officials in Washington, D. C., upon written interrogatories (R583, 584, 661, 679, 683, 691), a motion to permit the taking of depositions of certain other officials in Washington, D. C., upon oral interrogatories (R580), a demand for opportunity to cross-examine certain officials of Anglo Bank (R573), a motion for a further hearing on objections of appellants to the settlement of the litigation (R465), and a motion to vacate (R468) the final judgment dismissing the action with prejudice on July 2, 1942.

After hearing and oral arguments, said motions were denied on August 17, 1942, by the District Court (R737).

The petitioners then proceeded to take an appeal (R747) from, first, the final judgment dismissing the action with prejudice entered on July 2, 1942, and, secondly, the order made on August 17, 1942, denying the motions made after judgment dismissing the action.

The Reporter's Transcript supporting the judgment of the District Court entered July 2, 1942, consists solely of the transcription of the proceedings held on March 31, 1942 (R1845 to 1890) which incorporates, by stipulation of the parties (R1846), the Reporter's Transcript of the hearings held in July, 1941, and appears in the record on appeal at pages 989 to 1844, inclusive.

In designating and preparing the record on appeal, petitioners filed with the Clerk of the District Court, three narrative statements purportedly drawn pursuant to Rule 75(c) FRCP (R766, 844, 874). Excerpts from these narrative statements were printed in the record on appeal at the request of counsel for petitioners and appear at pages 766 to 894, inclusive. Said narrative statements, according to counsel for petitioners, were made up from, not testimony given by any witness at any hearing before the District Court or before any other public officer and subsequently submitted to the District Court, but from depositions filed with the Clerk after submission of the case, incomplete in many instances, unsigned in many instances, and never offered to the Court before dismissal of the action in any instance. Even at the present time they remain in the files of the Clerk of the District Court in their original sealed envelopes with seals unbroken.

Upon the designation by the petitioners of said narrative statements as a part of the record on appeal, the Anglo Bank opposed (R905) the inclusion of said statements on the grounds that they did not constitute testimony of witnesses or evidence of any kind or character before the District Court. Said opposition was presented to the District Court pursuant to Rule 75(h) FRCP and after hearing and oral argument, the District Court settled the differences between the parties in regard to said narrative statements by ordering that they be excluded from the record on appeal (R914, subparagraphs (c), (d), (e)). After the petitioners had docketed their record on appeal with the United States Circuit Court of Appeals, a motion was made by them in the Circuit Court of Appeals, pursuant to Rule 75(h), to correct the record (R1892) by including said narrative statements, on the ground that they were material omitted from the record on appeal by "error or accident". This motion of the petitioners was granted by the Circuit Court of Appeals (R1953). The motion appears at pages 1892 to 1898, inclusive, of the Record.

At the same time that the petitioners moved to enlarge the record on appeal, the Anglo Bank moved to dismiss the appeal of the petitioners from the District Court Order dated August 17, 1942, or its denial of the petitioners' motion to vacate the judgment of dismissal entered July 2, 1942 (R1909). Said motion was based in the main on the ground that an order denying a motion to vacate a final judgment under the circumstances existing in the case at bar is not an appealable order. The motion and affidavits in connection therewith appear at pages 1911 to 1952 of the Record. The Circuit Court of Appeals continued said

motion for determination at the time of the hearing on the appeal from the final judgment dismissing the action.

On February 15, 1944, written briefs having been filed by the petitioners, respondent Anglo Bank and others, an oral argument was had to the Circuit Court of Appeals, the Hon. Clifton Mathews, Albert Lee Stephens and William Healy sitting. Oral arguments were presented by counsel for respondent Anglo Bank and Aaron M. Sargent, acting as counsel for the petitioners. The cause was submitted for decision under date of February 15, 1944 (R1994), and under date of March 1, 1944, the Circuit Court of Appeals filed its written opinion (R1996-2004). A decree affirming the judgment of the District Court and granting costs in favor of the respondents was filed and entered upon the same day (R2004).

Petitioners, under date of March 28, 1944, filed a motion for an order vacating said judgment (R2005), together with certain supporting papers. The Circuit Court of Appeals, the Hon. Clifton Mathews and William Healy sitting, heard said motion on April 3, 1944 (R2057). Said motion was denied at the close of the oral argument thereof (R2060). Under date of March 28, 1944, a petition for rehearing by the Circuit Court of Appeals *en banc* was filed (R2017-2056). Said petition for rehearing was denied by order filed March 29, 1944 (R2061).